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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MACDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. MCKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS,

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

General Statement in Reply

Respondents' brief in opposition, while admitting the importance of the issues herein (Res. Br. p. 22), takes a disdainful approach to the entire matter—a matter which is of vital importance legally and generally to thousands

of churches and ministers and hundreds of thousands of members of the historic Congregational Christian Churches of the United States.

Respondents do not attempt to answer the major points in the Petition, or to discuss the rules of law therein. Respondents do make a feeble, but faulty, effort to state one additional point of New York law (Res. Br. p. 20), dealt with hereafter.

Quite shocking is respondents' suggestion that because of the relative size of the contending parties, this controversy "does not deserve the further attention of this Court" (Res. Br. p. 15). Simply because they represent a majority, respondents have no lawful right to confiscate, for the United Church of Christ, the use, control and funds of all of the denominational agencies of the Congregational Christian Churches and to assert herein that the *Cadman* opinion gave them full right to do so.

Contrary to respondents' effort to minimize the matter, this is the most important case, in this class of case, to come before this Court since *Watson* v. *Jones*, 13 Wall. (80 U. S.) 679 (1871) which involved a schism in the Presbyterian Church, and *Helm* v. *Zarecor*, 222 U. S. 32 (1911) which involved a union of two Presbyterian Church denominations and the use and control of a corporate publishing agency of one. It is comparable to the famous English case of *Free Church of Scotland* v. *Overtoun*, 94 L.T. 394 (1904) A.C. 515 involving a union of two Scottish presbyterial church bodies.

This case is novel and of far greater importance and wider interest, than any of those cases. It involves a church union, as well as a church schism, of national scope in one of the largest, most historic American church denominations.

In *Watson*, at page 714, this Court recognized that when, in such a situation, an appeal is made to the civil courts, they "must perform their functions as in other cases" and that:

> "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."

This case is particularly appropriate for determination under the Federal Declaratory Judgment Act. *Purcell* v. *Summers*, 126 F. 2d 398 (4th Cir. 1942); cert. den. 317 U. S. 640 (1942).

Both the appellate courts in *Cadman* and the courts below herein have avoided the merits of this tremendously important controversy, the New York courts on the ground they lacked power and jurisdiction to render a declaratory judgment in absence of named indispensable parties and the Federal courts below on the ground that the *opinion* in *Cadman* was *res judicata* here as to all issues and all parties. At least, the New York courts left it open for basic issues in this controversy to be adjudicated by the declaratory judgment remedy in an "appropriate action" in which such absent parties were brought before the Court (138b-141b; 159b; 162b-163b). That "appropriate action" is this case.

The purpose of law suits, and this law suit, is *not* simply "to get things decided", as District Judge Dimock observed (12a), but to effect justice and to effectively determine the merits of the controversy. A sense of injustice and lack of constitutional due process pervades all of the proceedings below, because of the courts' seeming

lack of desire to face and decide the real issues and to give these plaintiffs at least *one* "day in court" (Res. Br. p. 21) and one trial and one adjudication, on the merits, of their rights and legal relations (Petition, p. 18, 22-23).*

Respondents dyny any "schism", but not, significantly, the fact that 1365, or at least 25%, of the former Congregational Christian Churches have refused or failed to become part of the United Church of Christ (Petition p. 16). This is to say nothing of controversies between minority and majority members in local churches over votes taken there, as evidenced by the *amici curiae*. It ignores the fact, of record, that the Basis of Union was widely opposed (78b, 160b) and the General Council never received the requisite vote of approval and advice which it sought from the churches, members, associations and conferences (80b-82b, 53b-54b, 78b, 160b). On the record in the District Court, not a single Congregational Christian Church had yet joined the defendant United Church of Christ, which was simply a union of defendant General Council with defendant Evangelical and Reformed Church (85a-86a, 167a-168a, 172a, 304a).

Moreover, the District Court excluded, on defendants' objections, all evidence offered by plaintiffs as to the voting statistjes up to the date of the "trial"; and the reference in Respondents' brief (p. 16) is to such excluded evidence (R. 1922, *et seq.;* Pl. Ex. 5 for id.; R. 1943; 1947, 1949).

Respondents assertion (Res. Br. p. 3), that this Court should accept the U. S. Court of Appeals' interpretation of New York law would render meaningless Section 1(b) of Rule 19 of the Revised Rules of this Court that one of

* Cf. "The Sense of Injustice," by Prof. Edmond N. Cahn, pp. 13-14 (1949).

the "special and important reasons" for granting review on a writ of certiorari is:

> "Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law; * * *"

This Court, often, has reviewed and reversed erroneous interpretations of state law by Courts of Appeal in diversity cases, *e.g.*: *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437 (1959); *Six Companies* v. *Highway Dist.*, 311 U. S. 180 (1940); *West* v. *American T. & T. Co.*, 311 U. S. 223 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464 (1940).

Furthermore, both the courts below failed to mention the law of New York (Petition, pp. 23-33) as to the necessary elements of *res judicata* and collateral estoppel, in relation to declaratory judgment actions.

For example, the courts below ignored the New York law that the Court of Appeals has no power to grant a declaratory judgment, by judgment or opinion, or to make new findings; *res judicata* and collateral estoppel are doctrines of estoppel by "judgment," not by "opinion," and the "determination" of an action is the "judgment" not the "opinion"; no "adjudications" or "findings" are deemed made unless set forth in the judgment itself; and a dismissal of a declaratory judgment complaint for lack of power or jurisdiction to render a declaratory judgment in absence of indispensable parties, is not an "adjudication" of the merits of the claim or a bar to another declaratory judgment action wherein such parties are before the Court.

In any event, and certainly in such circumstances, this Court would not be bound to rely on the Court of Appeals for the applicable New York law.

The plain fact is that the courts below, in barring this action, have disregarded and ignored the law of the *Cadman* case itself.

The law of the *Cadman* case was that the New York courts had no power or jurisdiction to grant a declaratory judgment, effectively determining that controversy, in the absence of indispensable parties; and that the declaratory judgment remedy would be "available" in an "appropriate action" in which those parties were before the Court. *This action* being such an "appropriate action", the courts below were required to give full faith and credit to that judgment in *Cadman* (U. S. Const. Art. IV §1; *American Surety Co. v. Baldwin*, 287 U. S. 156, 165 (1932)).

The precise subject matter of the Basis Union and of *Cadman* complaint and the declarations sought there, is in the record (11b-18b). None of the "claims" asserted in *Cadman* were "adjudicated" on the merits (cf. Res. Br. pp. 6-10). The Appellate Division refused to make any findings or declarations (135b). The Court of Appeals had no power to do so (Petition, p. 26). The Appellate Division did not consider or make any determination upon questions of doctrine, polity or other ecclesiastical matters (139b, 146b).

Respondents seem confused as to whether "no federal question", or "no federal issue of general interest", is presented here. Actually, presented here are important federal and constitutional questions (Petition, pp. 17-41).

Respondents' statement that "The claims made in the instant action are exactly the same claims as those made in the *Cadman* action" (Res. Br. p. 11) is sheer nonsense. On a par is respondents' further statement that there has been no material change in the factual situation since *Cadman* (Res. Br. p. 13). That such comments are absurd

is apparent from a mere cursory comparison of the complaint in *Cadman* (1b-18b) with plaintiffs' complaints (72a, 165a, 176a) and Statements (293a, 319a, 248a, 276a, 285a) in this action.

The truth is that only several of the many declarations sought in this action, as to the various plaintiffs and defendants, are even similar to those sought in *Cadman;* and the great preponderance of the allegations and tendered issues in the complaint herein, concern material actions and events which occurred after the trial and judgment in *Cadman* and the defendants who were not parties in *Cadman.*

Accordingly, under the decisions of this Court (*Lawlor* v. *National Screen Service*, 349 U. S. 322, 328 (1955)) and the related law of New York (Petition, pp. 24-25, 31-32), the judgment in *Cadman* could not, in any event, be a bar to this action. See, also, 17 Am. Jur. page 166, §96, Note 17 and 49 A.L.R. 2d 1058.

Respondents twice quote (Res. Br. 9-10; fn. pp. 18-19), from the Court of Appeals' opinion in *Cadman*, but in each instance carefully omit the *key*, decisive sentence which reads: (159b; 306 N. Y. 151, 167):

> "*Such a remedy is available only in an appropriate action, which this is not (Civ. Prac. Act §§193, 473; Manhattan Storage & Warehouse Co.* v. *Movers & Warehousemen's Assn., 289 N. Y. 82; Ivory* v. *Edwards, 304 N. Y. 949).*" (emphasis supplied.)

These citations in that context refer to the unquestionable New York rule that the court must refuse a declaratory judgment in the absence of indispensable persons "whose absence will prevent an effective determination of the controversy" or whose interests are not severable

and would be inequitably affected by a judgment rendered between the parties before the court."

This statement and disposition is completely in harmony with similar statements in the minority opinion (162b, 163b; 306 N. Y. 151, 170) and in the majority and minority opinions of the Appellate Division (138b, 139b-140b; 279 App. Div. 1074).

Surely the Court of Appeals and the Appellate Division was not engaging in "idle talk" in stating that the remedy of declaratory judgment would be "available" to determine plaintiffs' rights in an "appropriate action"; and, in stating, also, that they were not passing on plaintiffs rights (163b, 138b). Certainly those courts never intended the judgment there to be urged or held as *res judicata* in respect of such an "appropriate action". For that to be so would be a mockery, because the very remedy said to be available in another action would be denied.

The opinions below are printed in the record (Petition, pp. X-4—X-13; 11a-34a). They are both predicated upon the basic fallacy that the New York Court of Appeals, in its *opinion* in the *Cadman* action for a declaratory judgment, made "findings", "adjudications" and "determinations" in respect of all of the issues and as to all of the parties in this action, barring any relief herein. It is the basic fallacy of these opinions, rather than their details which is important here.

That the proceedings before Judge Dimock constituted a violation of procedural due process and a departure from the accepted course of judicial proceedings is apparent from a reading of the minutes of the "trial" (R. 1903

et seq., as well as of the pre-trial proceedings. Petitioners' necessarily brief summary of these (Petition 7-9, 37-44) could be documented in depth.

Respondents, and the Courts Below, Have Ignored the Applicable Rules of *Res Judicata* and Collateral Estoppel and the Limitations Thereof Peculiar to Declaratory Judgments

Respondents erroneously argue, as to *res judicata*, that declaratory judgments are like other judgments and because the *opinion* of the Court of Appeals in *Cadman* did not carry a "declaratory judgment label" it was nonetheless a declaratory "adjudication", and "*res judicata*" (Res. Br. pp. 20-21).

Actually, there are, generally and in New York, certain recognized limitations peculiar to declaratory judgments in so far as the applicability of *res judicata* or collateral estoppel are concerned (10 A.L.R. 2nd, 782, 783).

A declaratory judgment is not *res judicata* on an issue not determined thereby. The *res judicata* effect of a declaratory judgment depends upon the scope of the declarations of rights made by the judgment. As to matters not declared by the judgment, the parties are not so precluded, although a declaration might have been made as to such matters (10 A.L.R. 2d 782, 784, 786, 787; Petition, pp. 25-31).

The rule is stated in Restatement, Judgments, in Comment *b* to §77 as follows:

> §77(b). *Effect of declaratory judgment on subsequent controversies.* The effect of a declaratory judgment in subsequent controversies between the parties depends upon the scope of the declaration of rights made by the judgment. As to matters

declared by the judgment, the parties are precluded from relitigating them; *as to matters not declared by the judgment, although a declaration might have been made as to them, the parties are not so precluded.*

"Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the defendant. The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters." (Emphasis supplied.)

The *Cadman* final judgments (pp. X14-X21) contain no findings, declarations, determinations or adjudications as to the merits of the claims made or the declaratory relief sought in the complaint or in counterclaim. The Court of Appeals had no power to do so by "judgment" or "opinion". The Appellate Division refused to do so.

Accordingly, *res judicata* was not applicable here.

Res Judicata and Collateral Estoppel are Doctrines of Bar or Estoppel by Judgment, Not by Opinion

This is the law under the decisions of New York and this Court (Petition, p. 30; *Ripley* v. *Storer*, 309 N. Y. 506, 512, 513; 132 N.E. 2d 87 (1956); *Rudd* v. *Cornell*, 171 N. Y. 114, 128-9, 63 N.E. 823 (1902); *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 326; Restatement, Judgments, Ch. 3 "Introductory Note, pp. 157 *et seq.*, §§41-49, 68.

Respondents' brief again makes it crystal clear that they rely solely and wholly for their plea of *res judicata*, on statements in the *opinion* of the Court of Appeals in *Cadman*. Respondents eschew the *judgments* in *Cadman* (X14-X21), as did the courts below.

Respondents say: "The *opinion* of the New York Court of Appeals in the *Cadman* case * * * makes it clear that the *Cadman* decision is *res judicata* as to the present action in accordance with the very principles of *res judicata* cited by petitioners." (Res. Br. pp. 17-18); and, "Further, the *opinion* of the New York Court of Appeals was full in *its* coverage and disposition of all claims advanced by plaintiffs"; and that because this opinion "did not carry a declaratory judgment label" is immaterial (Res. Br. p. 21).

But, in actual truth, under the "very principles of *res judicata*" cited by petitioners, this reliance on statements in that opinion for the claimed "findings" and adjudications to support *res judicata* or estoppel by judgment, is clearly erroneous and a deprivation of due process of law.

Elsewhere respondents argue (Res. Br. pp. 7-8) that "two claims were asserted and adjudicated in the *Cadman* case". It then develops (Res. Br. pp. 8-10) that these two so-called "adjudications" and "findings" are statements from the *opinion* of the Court of Appeals.

Respondents state: (Res. Br. pp. 18) "The Court of Appeals, like the District Court, gave the closest examination to the 'full' opinion of the New York Court of Appeals and necessarily found that it was, as that court stated, a determination on the merits".

Reference to the opinions of the courts below shows that they relied, fallaciously, entirely on statements made in the *opinion* of the Court of Appeals, which they con-

strued as "findings", "adjudications" and "determinations" (Petition, p. X-11, 13a-14a, 15a-16a, 18a-19a, 20a). (Of course, The District Court went even further and made findings in respect of facts which arose *after* the *Cadman* case (21a-34a) even though there was no trial in respect thereof.)

The rule that *res judicata* and collateral estoppel are doctrines of estoppel by *judgment* and not by *opinion* is even more strictly applied in declaratory judgment actions, since, in those actions, the findings and declarations relied upon as a bar must be set forth in the declaratory judgment itself.

The Judgment in *Cadman* Did Not Adjudicate on the Merits the Issues Presented Therein and Was Never Intended to Do So; and, Cannot, Under Due Process of Law, Constitute a Bar to This Action

Respondents rely heavily (Res. Br. pp. 7, 21) on the expression in the majority opinion in *Cadman* (159b) that "the complaint was properly dismissed on the merits". This expression was plainly erroneous. It does not appear in the order and judgment entered thereon (X-17-X19; 166b-172b). It obviously was never intended to bar another declaratory judgment action, in light of the statements in the two immediately preceding sentences (159b), that the declaratory judgment remedy "is available" in an "appropriate action" in which the named absent parties were brought before the Court.

Furthermore, the complaint had not, in fact, been dismissed "on the merits" by the Appellate Division. This is perfectly plain from the order of reversal of the Appellate Division (143b-145b); and the judgment entered thereon (145b-147b; Petition, Appendix E; pp. X14-X16) which

was affirmed by the Court of Appeals (159b; 167b; 170b; 172b); and from the order of the Appellate Division (135b-136b) which *specifically* denied defendants' motion to resettle said order of reversal by having it provide for a dismissal of the complaint "on the merits" (134b, Par. 6).

That the dismissal was not on the merits is *obvious* from *every* opinion, majority and minority, in *Cadman* (122b-124b; 138b-141b; 159b; 159-163b).

Respondents' also, cite several cases (Res. Br. p. 20) for the statement that "Under New York law a dismissal of a complaint for a declaratory judgment is, as in any action, in and of itself sufficient to constitute res judicata".

This is legally erroneous and not supported by the cases cited, two of which, *Bauer* and *Cold Metal*, are not New York cases.

The *Terraqua*, *Campbell*, *Bauer* and *Cold Metal* cases involved dismissals of complaints in the earlier actions, for *legal insufficiency* or want of equity.

The *Cadman* complaint was not dismissed for legal insufficiency. Even if the *judgment* in the prior action after trial specifically recites a dismissal "on the merits", such judgment does not bar the maintenance of another action for the same relief, where such dismissal was not, actually, on the merits. Section 482, N. Y. Civ. Prac. Act has not affected this rule. *Greenberg* v. *DeHart*, 4 N. Y. 2d 511, 514, 515 (1958); *Mink* v. *Keim*, 291 N. Y. 300, 303-4 (1943).

Contrary to Respondents (Res. Br. pp. 20-21), under New York law, the fact that a judgment does not specifically incorporate the words "without prejudice" does not mean that it was "with prejudice". Recourse to the record always may be had to show the true fact. *Sarama* v.

Sarama, 261 App. Div. 875 (4th Dept., 1941); *Overseas News Agency* v. *Overseas Press*, 185 Misc. 1010, 1011, aff'd 270 App. Div. 754 (1st Dept., 1946). See, generally, 17 Am. Jur. §105, p. 174 and cases cited.

All of this has been made abundantly clear by the very recent New York decision in *Brown* v. *Bullock*, 17 App. Div. 2d 424 (1st Dept., Dec. 20, 1962), wherein the complaint in the state action was dismissed "with prejudice", but the Appellate Division held that such a dismissal could not bar, on principles of *res judicata*, an identical action in the Federal Court. It stated at p. 428:

> "A complaint dismissed for lack of jurisdiction * * * is dismissed with prejudice. That means that the plaintiff cannot further present his claim in the courts of this State. *But it is not an adjudication of the merits of his claim, and obviously is no bar to prosecution of the suit in the proper jurisdiction.*" (emphasis added.)

So here, the dismissal of the *Cadman* case for lack of jurisdiction to grant effective declaratory judgment relief for absence of indispensable parties, did not preclude even an identical action in the state or Federal courts, where those parties were made present.

A judgment for the defendant is not on the merits where, as in *Cadman*, it is based merely on rules of procedure (i.e., §473 and 193 N. Y. Civ. Prac. Act) rather than on rules of substantive law. Restatement, Judgments §49a. If a judgment, as in *Cadman*, determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits—as where the judgment of dismissal is based on the lack of jurisdiction of the court over the subject of the action due to non-joinder of parties Restatement, Judgments §§49a, 52(g).

Such a dismissal leaves the merits unconsidered and undisposed of, and is not a bar to a subsequent action. 17 Am. Jur. "Dismissal" §95, pp. 164-5.

The *Cadman* case did not decide "nothing" (Res. Br. p. 18); but once the courts therein decided they were without jurisdiction to render any declaratory judgment as prayed for they should not have gone on to discuss any phase of the merits of the case and such discussion was *dicta*.

The Appellate Division, apparently with this in mind, specifically refused, on defendants' motion, to embody in its decision or judgment any findings or adjudications based on statements in its opinion (127b-134b, 135b-136b).

This is the very criticism that was justifiably made of the unfortunate majority opinion in *Dred Scott* v. *Sanford*, 19 Howard (60 U. S.) 393, 589, because "such an exertion of judicial power transcends the limits of the authority of the court."

As Mr. Justice Holmes pointed out in *Murray* v. *Pocatello*, 226 U. S. 318, 324 (1912), "if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were"; and "when jurisdiction to grant equitable relief was denied the ground of the merits could not be reached." (See, also, Petition, p. 19.)

Defendants' Positions Here and in *Cadman* are Totally Inconsistent

Respondents have the temerity to assert now, that the "General Council was the only necessary defendant" in the *Cadman* case (Res. Br. p. 19); and that there was no absence of an essential party in *Cadman* and the complaint therein was not dismissed "for lack of any essen-

tial party" (Res. Br. p. 18). Those statements are *completely contrary* to the assertions made in *Cadman* by defendant General Council (herein represented by the same attorneys).

In order to avoid any possible confusion, and to rivet this gross inconsistency, the petitioners annex hereto the text of defendant's motion to dismiss, which was granted in *Cadman*, and of the arguments in its briefs, wherein the General Council, repeatedly, asserted just the exact opposite position (Exhibit G, hereto, pp. X25-32; 405a-414a). Moreover, respondents' present statement is directly contrary to every opinion written by the appellate courts in *Cadman*, wherein defendant's above argument was accepted and followed.

In the same vein, respondents boldly assert "The image which plaintiffs thus see is only the reflection of their own attempt to play fast and loose between two courts" (Res. Br. p. 21). In *truth*, it is respondents who are engaging in such tactics, as Exhibit G attests. (See, also, Petition p. 34.)

In *Cadman*, the General Council raised every possible technicality to avoid an adjudication on the merits, and succeeded by its oft-repeated claim that the court there had no power to grant a declaratory judgment in absence of numerous parties defendant whose interests, it said, were not severable and would be inequitably effected by such a judgment. Now the General Council and the other defendants claim *res judicata*, based on *Cadman* and that all essential parties *were* present there!

Plaintiffs never claimed, in *Cadman* or in this case, that the Congregational corporate boards were agencies of the General Council or that any principal-agent relationship existed between the General Council and them. In

the complaints, and throughout both cases, plaintiffs asserted that these corporate boards were the agencies of the Congregational Christian Churches (11b-14b; 88a-89a). The constitution and by-laws of the General Council so states (12b; 76a-77a). There was no proof in the *Cadman* case of any such principal-agent relationship and there is none in this action. Defendants have denied any such relationship (e.g. Exhibit G, hereto, v. X-29).

Legal Authorities Cited by the Respondents and the Courts Below Do Not Support the Proposition Asserted by Them

In asserting (Res. Br. p. 21) that all defendants herein are entitled to the benefit of the *Cadman* "adjudication", regardless of whether they were bound by it, respondents cite *Israel* v. *Wood Dolson*, 1 N. Y. 2d 116 and *Gart* v. *Cole*, 263 F. 2d 244; cert. den. 359 U. S. 978. The same cases have been cited by the courts below (19a, 15a, X-13).

Neither of the cases is applicable or justifies the dismissal below.

The New York Court of Appeals held that Israel, having failed to prove a breach of contract on the part of Wood Dolson in the first case, was estopped from relitigating the same question in his later suit against Gross for inducing that breach. Nothing said in Israel would bar the litigation of issues never decided in *Cadman*.

The Court in the *Israel* case merely established another *test* for the application of *res judicata*—identity of issues. It did not extend the scope of the doctrine of *res judicata*.

The facts of this case call for the application of entirely different legal principles. This action does not involve a situation in which the liability of the present defendants

is "altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts." *Good Health Dairy Products Corp.* v. *Emory*, 275 N. Y. 14, 17 (1937), *Lawlor* v. *National Screen Service*, 349 U. S. 322 (1955).

The liability of the absent Congregational boards and agencies to these plaintiffs exists by reason of their own actions and is in no way dependent upon the actions of the General Council whether or not such actions were "exonerated" by the *Cadman* courts. The *Israel* case, by its own language, created no new class of exceptions to the law of New York and is no authority for permitting the absent defendants to claim the benefits of *res judicata*. The question is—are the adjudicated issues identical? The answer is—no (Petition pp. 31-33).

Nor is the case of *Gart* v. *Cole*, *supra*, applicable. On the contrary, the Court in that case went so far as to state that no attempt could be made to afford the defendant Cole, under the principles of *res judicata*, the benefits of the earlier decision because he had not been a party to the earlier case. It stated:

> "No determination by the state court negating the commission of any wrong by the administrator could be binding in his favor because he was not a party" (p. 134).

The courts below also held (X-13) that all the respondents here who were not parties to *Cadman* have the same "interests" as the General Council. That just is not so and if there had been a trial below, the contrary would have been shown. Respondents other than the General Council do not sustain to each other and to it a relationship which, under New York law, permits them to "claim

the benefits of" the *Cadman* decision. If they had any such relationship, the *Cadman* complaint would not have been dismissed for want of their presence there as parties (See, also, Appendix G, hereto, pp. X25-X32). This is strikingly true of respondent Evangelical and Reformed Church, and of United Church of Christ which did not exist when *Cadman* was tried. As to all the respondents, significant are the principles recognized and applied by this Court in the recent decision of *Lawlor* v. *National Screen Service*, 349 U. S. 322, 329; 330 (1955).

CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO
REPLY BRIEF FOR PETITIONER

APPENDIX G

Excerpts from Record and Defendant-Appellant's Briefs in *Cadman* v. *Kenyon*

(See pages 405a-414a of "Appendix to Plaintiff's-Appellants' Brief" herein in the United States Court of Appeals, submitted with Petition)

Ground of defendants motion to dismiss complaint.

"8. This Court is without power or jurisdiction to make an effective determination of this action as prayed by the plaintiffs, because of the absence as parties of persons, bodies and corporations indispensable and necessary to an effective determination, or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court. Such absent parties, one or more are

(a) The Evangelical and Reformed Church,

(b) The General Synod of the Evangelical and Reformed Church,

(c) The Corporation for The General Council of the Congregational Christian Churches of the United States,

(d) The American Board of Commissioners for Foreign Missions,

(e) The Board of Home Missions of the Congregational and Christian Churches and the various corporations of which the Board last named is alleged in paragraph 22(c) of the complaint to be 'the agent',

(f) The various other 'local or national Boards, agencies, corporations, commissions and instrumentalities for the promotion of the work of the Congregational Christian Churches referred to in paragraph 22(f) of the complaint'.

(g) The several independent Congregational Christian Churches from whom the complaint, by its prayers for judgment, Nos. 4, 6 and 7, proposes to take away what it denominates as rights and interests, including the property rights and interests."

(This statement appears at page 10 of Defendant's Appellate Division Brief; at page 14 of Defendant's Court of Appeals Brief; at pages 1328 and 2516-17 of the Record on Appeal)

Quotations from the brief filed by defendant, General Council in the Court of Appeals of the State of New York in *Cadman v. Kenyon:*

"The Sole Parties

This action is solely between two parties. No other parties were named." (at p. 2)

"POINT I

The Appellate Division was fully justified in holding that this action for declaratory judgments could, in a legal sense, serve no 'legitimate purpose': and that this case fell within the line of decision by this Court of Appeals holding that, under circumstances even less compelling than the present, 'a court may, and ordinarily must, refuse to render a declaratory judgment.'" (at p. 66)

Under this point heading defendant stated: (at pp. 66-7)

"The complaint professes a single cause of action in equity under section 473 C. P. A. It prays for six declaratory adjudications and also for a resultant permanent injunction affecting the rights and interests not only of the sole defendant but also of various corporations, boards and missions, of the local churches and their members, and of The Evangelical and Reformed Church.

In its opinion the Appellate Division declared (9506):

'A declaratory judgment serves a legitimate purpose only when all persons who may be affected thereby and who may question in a court the existence and scope of the rights declared are parties to the action and have opportunity to be heard. A court may, and ordinarily must, refuse to render a declaratory judgment in the absence of such parties. (*Manhattan Stor. & Warehouse Co. v. Movers Assn.*, 289 N. Y. 82; *Wood v. City of Salamanca*, 289 N. Y. 279).'

In the first of these cited decisions this Court of Appeals said (289 N. Y. 82, 88).

'An action for a declaration of "rights" and "legal relations" in accordance with section 473 of the Civil Practice Act serves a *legitimate purpose* where all persons who are interested in or might be affected by the enforcement of such "rights" and "legal relations" and who might [2876] question in a court the existence and scope of such rights, are parties to the action and have opportunity to be heard. As to persons who are not parties a declaratory judgment would be a mere academic pronouncement without juridical consequences, but which might be embarrassing if attempt is made thereafter to enforce these rights

in legal proceedings to which they are parties. *A court may, and ordinarily must, refuse to render a declaratory judgment in such case.* (*Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156.)' (Italics ours.)

See also for like statements: *New York Operators v. State Liquor Authority*, 285 N. Y. 272, 276; *Gilligan v. Cunningham*, 273 App. Div. 1046; and *Bach v. Grabfelder*, 233 App. Div. 773.

"POINT III

Furthermore and aside from the principles of discretion, policy and law applicable to actions for declaratory judgment, the dismissal of the complaint was required by Section 193 C. P. A.

That Section, in accordance with the former equity rule, requires that an action cannot be maintained and a judgment cannot be entered, where there are other parties 'whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court.'" (at p. 93)

On page 98 of this brief, under said Point III, defendant again listed the indispensable and necessary parties, listed in its motion to dismiss, *supra*, p. X25-X26, whose absence, it stated, required a dismissal of the case.

POINT VI-B

The claim that the court's jurisdiction in the matter of these non-defendant corporations can be rested on the theory of an alleged 'agency' for the

sole defendant (the General Council) is fallacious and begs the relevant questions.

(1) All these corporations are vitally 'interested in' and would be 'affected by' an adjudication of such agency. (§193 C.P.A.; *Manhattan Stor. & Ware. Co. v. Movers Assn.*, 289 N. Y. 82, 88; and Points I, II and III, pp. 66, 77, 93, *supra.*)

No court can lawfully make adjudications against the liberties and the property of a third person, or against charter powers of a corporation, not before the court, or predetermine that its property would 'be alienated or diverted' (301) from lawful purposes, by any unilateral judicial declaration or decision that such third person or corporation is 'an agent' of the defendant." (at p. 125)

Quotations from the brief filed by the defendant, General Council in the Appellate Division, Second Department of the Supreme Court of the State of New York in the case of *Cadman v. Keegan.*

"The Sole Parties

This action is solely between two parties. No other parties were named or served with process, and no other parties appeared or intervened." (at p. 2)

"(1) There are only two parties to this action, to wit: the Cadman Church (16) and the General Council (16-18). Over them alone did the Court below have jurisdiction." (at p. 98)

"Twelve Corporations and Boards Which Were not Parties to the Suit but Are En-

Appendix G

joined by the Judgment as to the Use of Their Property

The judgment below enumerates by name, in paragraph 'S', twelve corporations as follows (299):

(a) The Corporation for the General Council of The Congregational Christian Churches of the United States (Conn.);

(b) The American Board of Commissioners for Foreign Missions (Mass.);

(c) The Board of Home Missions of the Congregational and Christian Churches (Mass., Conn. and N. Y.);

(d) The American Missionary Association (N. Y.);

(e) The Congregational Home Missionary Society (N. Y.);

(f) The Congregational Church Building Society (N. Y.);

(g) The Congregational Sunday School Extension Society (N. Y.);

(h) The Congregational Board of Ministerial Relief (Conn.);

(i) Congregational Education Society (Mass.);

(j) Congregational Publishing Society (Mass.);

(k) The Annuity Fund for Congregational Ministers (N. J.);

(l) The Retirement Fund for Lay Workers (N. J.).

No one of these corporations or boards was a party to this litigation.

• • • • •

"POINT II

Under both the common law and the Federal and State Constitutions the Court below was without jurisdiction or lawful power to impose on twelve charitable and religious corporations, none of which was a party to this suit, permanent injunctions not only not confined to the 'Basis of Union' but extending in perpetual jurisdiction over the entire spiritual and ecclesiastical principles, corporate actions and properties of these religious bodies for the rest of time." (at p. 90)

• • • • •

POINT III-A

The Court below has cast in judgment foreign and domestic missionary and charitable corporations not before it." (at p. 98)

• • • • •

"Moreover, as recognized in Section 193 C. P. A., a court is without jurisdiction to render a judgment even as between the parties actually before it, if there is some other person 'whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court'. In such case, the absent person 'is an indispensable

party',—indispensable both to jurisdiction and to judgment." (at pp. 100-1)

In Point I (pages 2-5) of the "Reply Brief for Defendant-Appellant" in the Appellate Division, this same argument was reiterated at considerable length in varying language and concluded with the statement that "The absence of these corporations as parties was one of the specific grounds of the defendant's motions to dismiss."

Also, this same argument was made in defendant's trial brief.